Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

In the Matter of	)	
	)	
Appropriate Framework for Broadband	)	
Access to the Internet over Wireline Facilities	)	CC Docket No. 02-33
	)	
Universal Service Obligations of Broadband	)	
Providers	)	
	)	
Computer III Further Remand Proceedings:	)	
Bell Operating Company Provision of	)	CC Dockets Nos. 95-20, 98-10
Enhanced Services; 1998 Biennial Regulatory	)	
Review – Review of Computer III and ONA	)	
Safeguards and Requirements	)	

INITIAL COMMENTS OF MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.

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SUMMARY

McLeodUSA strongly supports the positions set forth in the comments jointly sponsored by ALTS in this proceeding ("Joint Comments"). Nevertheless, if the Commission is determined to depart from precedent on the subject of treatment of broadband services, the language of the Communications Act can lead only to the conclusion that the offering of "broadband access" involves a bundle of both telecommunications and information services, and that the bundle is subject to the Commission's Title II jurisdiction.

INTRODUCTION

> For some strange reason, monopolists always feel it necessary to rationalize their dominance in the marketplace by showing benevolence to the people they serve.
>
> In other words, they keep trying to sell the story to politicians and consumers that we should not worry about the lack of competition, as they – the "benevolent monopolist" – will provide us (especially those of us who attend grade school or live in rural areas) with all of the choices we may ever need or desire.

> While it is everyone's birthright to be as delusional as they want to be, the big question is why, after case study after case study discredits this ridiculous perspective, do otherwise rationale people keep buying this nonsense?[1]
>
> --Lawrence Spiwak

It is the responsibility of the FCC, as the body charged with protecting the public interest under the Communications Act, to refuse to buy this nonsense.

"Deregulate us and we will provide all of the broadband services anybody could ever want," plead the RBOCs. Given the RBOC's track record, regulators should be very skeptical of promises from the RBOCs. The Bell Companies have had a long history of making promises and then breaking those promises after they have obtained what they sought. The Bell Companies said let us merge and we will enter into out-of-region markets and engage in meaningful competition. The Bells have merged. There has been no meaningful out-of-region competition between the Bell Companies. The Bell Companies supported passage of the Telecom Act, yet have spent the last 6 years challenging the Act in court. Furthermore, six years after the passage of the Telecom Act the Bell Companies have failed to open their markets to local competition, as evidenced by the significant majority of states in which the Bells have failed to obtain Section 271 approval and by the depleted state of the CLEC industry.

In this NPRM the FCC seeks to classify retail wireline broadband internet access services as "information services" exempt from regulation under Title II of the Communications Act, regardless of whether such services were provisioned over a third-party's facilities or were self-provisioned. The FCC further tentatively concludes that the transmission portion of retail wireline service provided over an entity's own facilities is "telecommunications," and not a

[1] Lawrence J. Spiwak, Phoenix Institute, Commentary: A Crisis of Conscience Special to United Press International, Washington, September 8, 2001.

"telecommunications service" under the Telecom Act. As set forth in the Joint Comments, this conclusion subverts the entire basis for regulation of much RBOC activity under Title II of the Act.

One of the main purported goals of the NPRM is to encourage investment in broadband network by limiting regulatory uncertainty.[2] The irony of this is numbing. The FCC appears to suggest in the NPRM that, in the present world of near-complete monopoly ownership of last mile bottleneck facilities, that far fewer (or no) rules will somehow create more certainty. The NPRM itself has created far more uncertainty than existed before its release. The NPRM raises, and asks parties to comment on, over 100 (One Hundred) separate questions, not including many subparts. Furthermore, in the tentative conclusions set forth in the NPRM, the FCC appears to be seeking to overturn many of the cornerstones of telecommunications law upon which CLECs, IXCs and ISPs have invested in and built their businesses. In the NPRM, the FCC seeks comments on conclusions that would result in an "end run" around the unbundling requirements of Section 251 of the Telecom Act, and seeks to ignore or abolish its own "C*omputer Inquir*y" rules which have provided competitors with open access to transmission facilities for the past 20 years. It is difficult to see where the regulatory certainty comes from in the wake of such sweeping and unprecedented changes.

I. The Existing Statutory Framework for Treating Broadband Services Should Continue.

McLeodUSA respectfully submits that the present regulatory framework, which includes the Telecom Act of 1996, and the *Computer Inquiry* rules is more than adequate to address the goal of ubiquitous broadband deployment. The existing regulatory framework is more than flexible enough

to accommodate the deployment of broadband and the "next generation" networks. The existing regulatory framework, however, must be enforced by the FCC and state commissions to a greater degree than has been the case in the past. Even if the FCC were to diverge from the existing regulatory framework, the radical changes proposed by the FCC are not warranted as discussed more fully below.

The NPRM is to a large extent the regulatory counter-part of the Tauzin-Dingell legislation that is presently before the Senate. The NPRM has many of the same stated goals, and seeks to reach those goals in many of the same ways, as the bill. As such, much of the same criticism leveled at the Tauzin-Dingell Bill should be leveled at the NPRM. No better parallel and lightening rod for such criticism exists than the NPRM's purported goal of encouraging ubiquitous availability of broadband service to all Americans. Like Tauzin-Dingle, the NPRM does not even lead to the purported goal of ubiquitous broadband deployment, and is otherwise unnecessary. First of all, the deployment of broadband and other advanced services has made significant progress already due to the investment and stimulus from competitive local exchange carriers ("CLECs"), internet service providers ("ISPs") and interexchange carriers ("IXCs"). The Bell companies have been notoriously delinquent in their deployment of many advanced services over the last 20 years, largely out of fear of cannibalizing their existing services. In fact the Bell companies only began to deploy DSL in earnest in response to competition from DLECs.

The sense of urgency to deploy broadband is largely belied by two key facts: (1) broadband already has been provisioned to the vast majority of the population and continues to be deployed; (2) those who already have broadband available to them are not taking the service at an aggressive pace. A recent study by J.P. Morgan indicates that 85% of American households already have broadband service available to them. Furthermore, the Bell Companies already contribute greatly to this

[2] NPRM Par. 5. See also, Separate Statement of Chairman Michael K. Powell, p. 1.

availability. Indeed, according to its own communications, Verizon has currently deployed DSL service to central offices serving 79% of all access lines in its service territory. Similarly, BellSouth reports that it presently offers DSL service to 70% of its total customers, and SBC claims that it is "the nation's leading DSL internet access service provider" providing DSL service to more than 60% of its total customers. Despite this largely existing and ever expanding degree of availability, American consumers have been cautious to subscribe to broadband service. The J.P. Morgan report indicates that despite the fact that 85% of American households have broadband service available to them, only 12% of such households have chosen to subscribe. Thus, why the need to rush into such sweeping, unprecedented regulatory reforms that strengthen the Bell's monopoly control over telephony and threatens to create a Bell monopoly for broadband, when broadband is already being deployed faster than demand already?

Not only do the tentative conclusions reached in the NPRM constitute bad policy, they wreak havoc with the existing legal framework as well. In order to understand how this is so, it is important to understand how the conclusions pondered by the NPRM attempt seek to accomplish an unnecessary amount of overhauling of existing law.[3]

When a customer connects to the internet, there are two separate functions that take place. The pure transmission of data, on the one hand, and on the other, the manipulation or processing of data. According to the Telecom Act the manipulation or processing of data is an "information service:"

> The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications and includes electronic publishing, but does not include any use of any such capability for the management,

[3] McLeodUSA agrees with the treatment on this subject presented in the Joint Comments. It is not McLeodUSA's goal to rehash such treatment here, only to emphasize key components of same and offer some additional granularity.

> control or operation of a telecommunication system or the management of a telecommunications service.[4]

The transmission of data can be classified pursuant to the Telecom Act as either "telecommunications", which is defined as:

> The transmission, between or among points specified by the user, of information of the users choosing, without change in the form or content of the information as sent and received;[5]

or "telecommunications service" which the Act defines as:

> The offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.[6]

The important distinction is that "telecommunications" can be either common carriage or private transmission. A "telecommunications service," however, is, by definition, common carriage, which must be offered directly to the public, regardless of the specific facilities used. The FCC's tentative conclusion that the transmission function of retail wireline services provided over an entity's own facilities is "telecommunications," and not a "telecommunications service," begs the conclusion that CLECs who provide broadband services are not "telecommunications carriers" and, therefore, are not entitled to use Section 251(c) for the provision of such services.

Although many of the functions of internet access service are information services, much of the value of such internet access service to the consumer comes from the transmission path which connects the customer's computer to the internet. The fact that such transmission path is bundled together with information services such as web pages, email storage and transmission protocols, does not make the underlying "telecommunications service" (i.e., transmission path)

[4] Telecom Act, Sec. 3(20).
[5] *Id*. Sec. 3(43).
[6] *Id*. Sec. 3(46).

go away or become irrelevant, any more than does the bundling of voice mail with basic telephony service change the characteristic of that service to anything other than a telecommunications service.

The FCC tentatively concludes that wireline broadband internet services are information services, and concludes that any other service or transmission path which is coupled with such broadband wireline internet services, becomes an information service as well. The FCC's tentative conclusions propose that there are no longer underlying transmission services, only competitive information services. "Information services" of course, are treated under Title I of the Telecom Act, as opposed to "telecommunications services," which fall under the "common carriage" provisions of Title II. The impact of mere Title I protection would, of course, be catastrophic for CLECs. CLECs could be denied access to any facility capable of delivering a broadband internet service. At best CLECs would only be entitled access to a facility capable of delivering a broadband internet access service only for the provisioning of basic telecom services. This second scenario is virtually as bad as the first. Not only do CLECs lose the ability to generate revenue and market presence via offering broadband services, CLECs are placed at a tremendous competitive disadvantage in the marketplace by not being able to offer broadband services.

The FCC has previously determined in the *Computer Inquiry* line of cases that "basic transmission services are traditional common carrier communications services," but that "enhanced services are not."[7] The FCC has indicated further that basic service is limited to the "common carrier offering of transmission capacity for the movement of information," which

[7] Computer II, Final Order, 77 FCC Rcd 384 (1980) at 430 (Par 119).

clearly contemplates the provision of a communications path for the transmission of voice and data information.[8]

The FCC has also previously established that frame relay service is a basic transmission service regulated under Title II.[9] The FCC held in it's *Frame Relay Order* that frame relay service is an enhanced service, noting that even though frame relay is a technology that altered the content of the transmission, it is nevertheless a transmission technology.[10] The FCC has emphasized that transmission protocols do not convert a basic service into an enhanced service.

Even more importantly the FCC rejected the claim that the service at issue was enhanced because some customers also received some enhanced services in addition to basic frame relay transmission. The FCC specifically rejected the contamination theory notion that when a service combines both basic and enhanced functions the basic service function is "contaminated," and the entire service be treated as an enhanced service. The FCC reasoned in the *Frame Relay Order* that if such were the case that any carrier could escape the Title II regulation of its basic service offerings by combining same with an enhanced service.[11] However, the FCC in its current NPRM seeks to eliminate this important regulatory tenant.

The FCC now mistakenly attempts to conclude that an incumbent monopolist carrier's last mile bottleneck transmission facilities cease to retain their common carrier characteristics should the monopolist attempt to use such facilities to provide its own internet access service. According to the current FCC's new interpretation, if a carrier bundles a telecom service with an information service, the telecom service apparently disappears. This is a poor policy. ILECs should not be able to shirk their responsibilities as common carriers by merely bundling an

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[8] *Id*. at par 93.
[9] *In Re: Independent Data Communications Manufacturers Ass'n, Inc., DA 95-2190, 10 F. C. C. Report 13717 (1995).*
[10] *Frame Relay Order,* par 34.

information service with its basic transmission services. Up to this point, the FCC recognized the importance of separating the availability of the underlying transmission service as a means of preventing ILECs from discriminating against customers.[12] Now, under a misinterpretation of the Telecom Act's definitional provisions, the FCC attempts to throw out this important principle.[13] According to the tentative conclusions reached by the FCC in this NPRM, if an ILEC offers internet access over it's own facilities, it is not offering "telecommunications for a fee directly to the public," and, accordingly, is not offering a "telecommunications service."[14]

The definitions of the terms "information service," "telecommunications service," and "telecommunications" were expressly intended to acknowledge the concept from the *Computer Inquiry* cases that there is always a "telecommunications service" underlying every "information service." The FCC's tentative conclusion that Congress intended exactly the opposite is belied is not accurate and will lead to very troublesome results for competitors and consumers.

II. If the FCC Determines That it Should Reject the Existing Framework, It Must Conclude the Broadband Access Is a Bundle of Telecommunications and Information Services.

In its NRPM, the Commission asks whether it should continue to apply the framework contained in the *Second Computer Inquiry*, or whether that framework should be modified because of the nature of broadband access services. NPRM at Par. 31. The Joint Comments set forth a compelling basis for continuing to follow the existing regulatory framework; and McLeodUSA strongly advocates the position contained in those comments. Nevertheless, if the

[11] *Id*. Par. 42-45.
[12] CPE/Enhanced Services Bundling Order Par 44.
[13] NPRM Par. 25.
[14] NPRM Par. 61.

Commission is determined to chart a new course on broadband services, it should do so by returning to the very basics of the Communications Act.

Those basics obviously start with the definitional sections. As the Commission notes, the broadband services currently offered by providers are different from the broadband services that the Commission examined in its *Computer Inquiry* orders. Broadband services offered today include, in a single package, internet access (allowing for storage and retrieval of information from other computers connected to the internet), instant messaging (using a variety of protocols, all of which allow for the real-time exchange of text messages), email, and direct transfer of computer files between users. Thus, any reexamination of the framework established in the *Computer Inquiry* orders should begin by examining how the Communications Act classifies the functions that are a part of broadband service.

As noted, the Act defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[15] This definition clearly fits the functions provided by broadband access of which includes accessing web pages and retrieving information stored on those pages. Thus, for example, a user requesting retrieval of airline schedules between locations specified by the user is clearly receiving an information service. Similarly, a user retrieving a file stored on a computer connected to the internet is also making use of an information service.

In contrast to an information service, the Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of facilities used."[16] "Telecommunications" is

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15 47 U.S.C. § 153(20).
16 47 U.S.C. § 153(46).

defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[17] As previously stated by the Commission, under this definition, an entity *provides* telecommunications only when it both provides a transparent transmission path *and* it does not change the form or content of the information.[18] If this offering is made directly to the public for a fee, it is deemed a "telecommunications service."

It seems clear that, if the Commission wishes to abandon the *Computer Inquiry* framework, there is no real way to avoid the conclusion that functions such as email, file transfer, and instant messaging qualify as "communications services" under the definitions of the Act. In each, the information transmitted by the sending party is exactly the same information received by the receiving party, whether that information is simple text (as is the case of email and instant messages) or a computer file. In all these cases, what takes place is "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." Such transmission is "telecommunications" under the Act.

This conclusion should not be surprising. The Commission has always treated the raw transmission of data as a telecommunications service (for example, making no regulatory distinction between a dedicated point-to-point circuit carrying voice traffic and the same circuit carrying data traffic). Such "raw transmission" is exactly the function that occurs with email, instant messaging, and file transfers. While such transmission occurs using a packet-switched network rather than a point-to-point or circuit switched network, there is no logical reason why

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17 *Id.* § 153(43).

18 *Report to Congress*, 13 FCC Rcd at 11521, para. 41. Therefore, "an entity offering a simple, transparent transmission path, without the capability of providing enhanced functionality, *offers* 'telecommunications.'" *Id*. at 11520, para. 39 (emphasis added).

the manner of switching should affect the regulatory classification (nor is there a provision in the Act allowing for such an effect).

Thus, if the Commission determines that it should no longer apply the framework contained in the *Computer Inquiry* decisions, and requires a facilities-based common carrier providing information services to make its facilities available to other telecommunications carriers, it cannot avoid the conclusion that the service offered to customers as "broadband access" includes both information services and telecommunications services.

It is important to note that this is different in kind from concluding only that there is a "telecommunications" component underlying the broadband access service. That conclusion is correct, and is in fact definitionally required for an information service. It is also consistent with the Commission's *Computer Inquiry* line of decisions, and underlies the analysis contained in the Joint Comments which McLeodUSA supports. Abandoning that framework, however, leads one to the broader conclusion that the broadband service itself constitutes the offering of a telecommunications service, in addition to the offering of an information service. That is, broadband service, as offered to the public, cuts across the "information service" and "telecommunications service" boundary, and includes both types of services.

The fact that information and telecommunications services may be bundled together and offered to the public as "broadband access" does not change the nature of either of the included services. For example, the Commission has stated that "[i]t is plain, for example, that an incumbent local exchange carrier cannot escape Title II regulation of its residential local exchange service simply by packaging that service with voice mail."[19] Nor does such bundling require any change to the conclusion that telecommunications and information services are

mutually exclusive categories.[20] Instead, all that is required is a recognition that the product offered to customers is a bundle of both types of services (in the same way that bundling of local exchange service and voice mail, even if the bundle is marketed to customers as a single product, does not change the underlying nature of the included services themselves).

There are several implications to this analysis. First is the conclusion that because broadband access to customers is (at least in part) a telecommunications service, carriers are entitled as a matter of right to acquire the use of facilities to provide those services under 47 U.S.C. Section 251(c)(3). As a corollary of this, it is clear that those same facilities may be used by another carrier pursuant to Section 251(c)(3) to provide non-telecommunications services as well as telecommunications services (in the same way that a unbundled loop leased to provide local exchange service can also be used by the acquiring party to provide information services as well).

Second is the conclusion many entities now deemed to provide only "information services" would be providers of "telecommunications services" as well. Of course, this conclusion does not necessitate the extension of Title II regulation to those entities which have never been subject to such regulation. Most directly, non-facilities-based providers of telecommunications services could easily be the subject of regulatory forbearance under Section 706 of the Telecommunications Act of 1996, especially when those services are provided in a bundle with information services.[21]

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19 *Report to Congress*, CC Docket No. 96-45, FCC 98-67 (April 10, 1998), Par. 60.

20 *Id.*, Par. 39

21 It should be noted that the explicit forbearance authority contained in Section 706 was not available to the Commission at the time of the *Computer Inquiry* decisions.

Respectfully submitted,

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